



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52

[EPA-R03-OAR-2011-0680; FRL-9685-5]

Determination of Failure to Attain by 2005 and Determination of Current Attainment of the 1-Hour Ozone National Ambient Air Quality Standards in the Baltimore Nonattainment Area in Maryland

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is issuing two separate and independent final determinations related to the Baltimore 1-hour ozone nonattainment area. First, EPA is determining that the Baltimore area previously failed to attain the 1-hour ozone National Ambient Air Quality Standard (NAAQS) by its applicable attainment deadline of November 15, 2005 (based on complete, quality-assured and certified ozone monitoring data for 2003-2005). Second, EPA is also determining that the Baltimore area is currently attaining the now revoked 1-hour ozone NAAQS based on complete, quality-assured and certified ozone monitoring data for 2008 -2010 and continuing for 2009-2011. Thus, quality- assured ozone monitoring data in the Air Quality System (AQS) show that the area has been attaining the revoked 1-hour ozone standard since 2008. EPA's determination that the area has attained the 1-hour ozone standard obviates the need for submission of any contingency measures for failure to attain that revoked standard.

DATES: This final rule is effective on [insert date 30 days from date of publication].

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2011-0680. All documents in the docket are listed in the www.regulations.gov website. Although listed in the electronic docket, some information is not publicly available, i.e.,

confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

FOR FURTHER INFORMATION CONTACT: Christopher Cripps, (215) 814-2179, or by e-mail at cripps.christopher@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document, whenever “we,” “us,” or “our” is used, we mean EPA.

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I. What Actions EPA is Taking?

EPA is issuing two separate and independent determinations for the Baltimore area related to implementation of anti-backsliding requirements for the 1-hour ozone NAAQS.¹

¹ Hereafter the term “1-hour ozone NAAQS” may be expressed either as “1-hour ozone NAAQS” or as “1-hour ozone standard.”

A. Determination of Failure to Attain the 1-hour Ozone NAAQS by the Applicable Attainment Date

Pursuant to EPA's authority to ensure implementation of 1-hour ozone anti-backsliding requirements and section 301 of the Clean Air Act (CAA), EPA is determining that complete, quality-assured and certified data for 2003-2005 show that the Baltimore area previously failed to attain the 1-hour ozone standard by its applicable November 15, 2005 attainment deadline.

B. Determination of Current Attainment of the 1-hour Ozone NAAQS

EPA is determining that the Baltimore area is currently attaining the 1-hour ozone standard.

EPA's determination is based on the most recent three-year periods of complete, quality-assured and certified data, 2008-2010 and continuing in 2009-2011. Moreover, complete, quality-assured and certified data show that the Baltimore area has attained the 1-hour ozone standard since the 2006-2008 monitoring period and for every three-year period since that time. Pursuant to EPA's interpretation, as set forth in its Clean Data Policy² and the cases and regulations that embody it, EPA has determined that the Baltimore area is no longer obliged to submit and implement the 1-hour ozone contingency measure requirement of CAA section 172(c)(9).

In order to determine the area's air quality status for purposes of this action, EPA reviewed ozone monitoring air quality data from the states, in accordance with 40 CFR 50.9, 40 CFR part 50 appendix H, and EPA policy and guidance, as well as data processing, data rounding and data completeness requirements. EPA's review of the air quality data and related rationale for these

² See "Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard," (Clean Data Policy) dated May 10, 1995.

determinations are explained in the Notice of Proposed Rulemaking (NPR) published in the *Federal Register* on February 1, 2012 (77 FR 4940) (hereafter “the NPR for this action” or “the February 1, 2012 NPR”) and will not be restated here.

II. What is the Background for these Actions?

The Baltimore area is composed of Baltimore, Carroll, Harford and Howard Counties and the City of Baltimore.³ The 1-hour ozone standard designations were established by EPA following the enactment of the 1990 Amendments to the CAA. *See* 56 FR 56694, November 6, 1991. Each area of the country that was designated nonattainment for the 1-hour ozone NAAQS was classified by operation of law as marginal, moderate, serious, severe, or extreme depending on the severity of the area’s air quality problem. (*See* CAA sections 107(d)(1)(C) and 181(a)). The Baltimore area was designated nonattainment under the 1-hour ozone NAAQS and classified as severe-15, with an applicable attainment date of November 15, 2005.

On July 18, 1997, (62 FR 38856), EPA promulgated a new, more protective standard for ozone based on eight-hour average concentrations (the “1997 eight-hour ozone NAAQS”). EPA designated and classified most areas of the country under the eight-hour ozone NAAQS in an April 30, 2004 final rule (69 FR 23858). In this April 30, 2004 final rule EPA designated the Baltimore area nonattainment under the 1997 eight-hour ozone NAAQS and classified the area as moderate.⁴

³ These same counties were designated nonattainment under the 1997 8-hour ozone NAAQS and the 2008 ozone NAAQS. *See* 40 CFR 81.321 and 77 FR 30088 at 30127, May 21, 2012.

⁴ Subsequently, pursuant to section 181(b)(2), EPA reclassified the Baltimore area as a serious ozone nonattainment area due to the area’s failure to attain 1997 eight-hour ozone NAAQS on time. *See* 77 FR 4901, February 1, 2012.

On April 30, 2004 (69 FR 23951), EPA also issued a final rule entitled “Final Rule To Implement The 8-hour Ozone National Ambient Air Quality Standard - Phase 1,” referred to as the Phase 1 Rule. Among other matters, this rule revoked the 1-hour ozone NAAQS in most areas of the country, effective June 15, 2005. (*See* 40 CFR 50.9(b); 69 FR at 23996; and 70 FR 44470 (August 3, 2005)). The Phase 1 Rule also set forth how anti-backsliding principles will ensure continued progress toward attainment of the eight-hour ozone NAAQS by identifying which 1-hour ozone requirements remain applicable in an area after revocation of the 1-hour ozone NAAQS.

Although EPA revoked the 1-hour ozone standard (effective June 15, 2005), eight-hour ozone nonattainment areas remain subject to certain 1-hour anti-backsliding requirements based on their 1-hour ozone classification. Initially, EPA’s Phase 1 rule to address the transition from the 1-hour to the eight-hour ozone standard did not include 1-hour nonattainment area contingency measures or major source penalty fee programs among the measures retained as 1-hour ozone anti-backsliding requirements. However, on December 23, 2006, the United States Court of Appeals for the District of Columbia Circuit determined that EPA should not have excluded these requirements (and certain others not relevant here) from its anti-backsliding requirements. *South Coast Air Quality Management District v. EPA*,⁵ 472 F.3d 882 (D.C. Cir. 2006), *reh’g denied* 489 F.3d 1245 (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review). Thus, the Court vacated the provisions that excluded these requirements. As a result, states must continue to meet the obligations for 1-hour ozone NAAQS contingency measures. On May 14, 2012 (77 FR 28424), EPA issued a final rule that, among other things, removed the vacated provisions of 40 CFR 51.905(e) and addressed the anti-

⁵ Hereafter this decision will be called “*South Coast*.”

backsliding requirement for contingency measures for failure to attain or make reasonable further progress toward attainment of the 1-hour ozone standard. *See* 74 FR 2936, January 16, 2009 (proposed rule); 74 FR 7027, February 12, 2009 (notice of public hearing and extension of comment period); and 77 FR 28424, May 14, 2012. On February 1, 2012, EPA proposed the determinations that are the subject of this final rulemaking action.⁶

III. What Comments were received on these Actions and what are EPA's responses?

We received comments from the Sierra Club, which opposed aspects of both actions and contended that the proposed rule was incomplete. Below, EPA summarizes those comments and sets forth EPA's responses.

A. Comments on the Determination of Attainment of the 1-hour ozone NAAQS

Comment 1:

The commenter claimed that a finding that Baltimore has attained since 2008 is premature because monitored data for years since 2008 are for years that are not reflective of the historic trend of emissions. In support of their position, the commenter cite *Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks, 1990-2010*, (February 2012) to support the proposition that reductions in emissions of NO_x and VOC⁷ in 2008 and 2009 are due in part to nonpermanent reductions in electricity demand and other emissions related activities resulting from the economic recession. The commenter also noted that the same draft inventory stated that CO₂ emissions rose by 3.7 percent – the largest increase in a 21 year period – which should

⁶ EPA's February 1, 2012 *Federal Register* NPR was captioned as potentially affecting 40 CFR parts 52 and 81. Because the final action does not change the classification or other provisions relating to the Baltimore area codified in 40 CFR part 81, this action as finalized results only in revision of 40 CFR part 52.

⁷ NO_x is an abbreviation for "nitrogen oxides;" VOC is an abbreviation for "volatile organic compounds."

correlate to increasing NO_x and VOC emissions from all sectors as well. The commenter contends that EPA is required in this rulemaking to further determine that the emissions decreases were due to pollution controls and not the economic downturn and cited section 107(d)(3)(E)(iii) of the CAA, which states: “the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions.” The commenter argues that EPA is precluded here from making a determination of attainment based on monitored air quality, unless EPA makes an additional analysis and determination that air quality is due to permanent and enforceable reductions from enforceable limits and control measures.

Response 1:

EPA disagrees with the comment. EPA’s determination of attainment in this final rule is properly based on monitored air quality, and it complies with the statutory and regulatory procedures that govern the making of a determination of attainment for the purposes of comparison to the 1-hour NAAQS. *See* 40 CFR 50.9 and Appendix H. This determination is by definition solely focused on monitored air quality concentrations and does not involve an assessment of causes for those concentrations. Thus it is separate and independent of the inquiry into the origins of the reduced monitored ambient concentrations. The commenter conflates EPA’s obligations when making a determination of attainment, which is based solely on monitored air quality concentrations, with separate and additional obligations that apply only when EPA is evaluating a request to redesignate an area from nonattainment to attainment – a process that is not being undertaken here. The statutory provision cited by commenter, section

107(d)(3)(E)(iii) of the CAA, applies only in the context of a redesignation request, and explicitly lists specific criteria that must be met for redesignation, which are separate from and in addition to the criteria that must be met when making a determination of attainment.

In the quite different context of a redesignation, section 107(d)(3)(E)(iii) of the CAA requires EPA to determine, among other things, that attainment of a NAAQS resulted from permanent and enforceable emissions reductions under the applicable SIP and Federal rules. Section 107(d)(3)(E)(i) of the CAA lists a determination of attainment as an independent factor, separate and apart from the other criteria for approving a redesignation request. Section 107(d)(3)(E)(iii) of the CAA applies only when EPA proposes to redesignate an area from nonattainment of a NAAQS to attainment. In our February 1, 2012 NPR, EPA did not propose to redesignate the Baltimore area to attainment of the 1-hour ozone NAAQS. Moreover, after revocation of the 1-hour ozone NAAQS in 2005, EPA no longer redesignates areas to attainment of the 1-hour ozone NAAQS. Nor as the commenter claimed, did EPA propose to “reclassify” the Baltimore area.⁸ Instead, the February 1, 2012 NPR proposed only to determine that the Baltimore area has attained the 1-hour ozone NAAQS based upon quality-assured and certified data for each consecutive 3-year period from 2006 to 2008 and through 2008 to 2010. EPA also proposed to determine that the area continues to attain during the most recent 3-year period for which data are available, 2009-2011, based upon data available for 2011. As EPA notes elsewhere in its responses to comments, these 2011 data have now been certified and quality-assured, and thus establish that the area continues in attainment for the 1-hour ozone standard. In accordance with the statute and EPA’s regulations, EPA’s determination of attainment is based solely upon

⁸ After revocation of the 1-hour ozone standard, EPA no longer reclassifies areas under that standard. Moreover, even prior to revocation, the statute did not provide for reclassification of severe areas upon a failure to attain the standard by the applicable attainment date. *See* section 181(b)(2).

monitored air quality data which establish that the area's air quality has attained the revoked 1-hour ozone NAAQS. EPA's determination therefore meets regulatory requirements for the clearly defined purpose for which it is made. The commenter's concerns and contentions, therefore, are inaccurate, and do not in any way detract from the sound basis for EPA's final determination that Baltimore has attained the 1 –hour ozone standard.

Comment 2:

The commenter urges the importance of showing that the improvement in air quality is not due to the economic downturn is important because the air quality data indicate that the Baltimore area is at the upper limit of what can be considered attainment (3.1 expected exceedances over 2009 to 2011) under the 1-hour ozone NAAQS. The commenter suggests that the air quality improvement and continued attainment may be due to economic factors and not to pollution controls and argues that the Baltimore area may quickly slip back into nonattainment as the economy recovers, and that any "redesignation of the area to attainment will not be valid."

Response 2:

EPA disagrees with the comment. As set forth in EPA's response to Comment 1, as is appropriate, EPA here is making only a determination of attainment for the 1-hour ozone standard based on monitored air quality. EPA is not redesignating the area to attainment for that standard – nor could the Agency do so, in view of the fact that the 1-hour ozone standard has been revoked since 2005. EPA's clearly defined determination of attainment here is consistent with the regulations that apply, and is based upon three years of complete, quality-assured monitoring data. For each NAAQS, EPA establishes through regulation procedures for the

requisite level (in this case 0.12 ppm⁹), form (averaging periods, etc.) and, minimum data quality and handling conventions necessary to distinguish compliance from noncompliance. Although the 1-hour ozone NAAQS as promulgated in 40 CFR 50.9 includes no discussion of specific rounding conventions regarding rounding measured ambient air quality data or the expected number of exceedances for a year or over a consecutive three year period, our publicly articulated position and the approach long since universally adopted by the air quality management community is that the interpretation of the 1-hour ozone standard requires rounding ambient air quality data consistent with the stated level of the standard. Section 1.0 of Appendix H to 40 CFR part 50 explains how to determine when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 ppm is equal to or less than 1. Section 1.0 of Appendix H refers to “Guideline for Interpretation of Ozone Air Quality Standards”¹⁰ for an “expanded discussion of these procedures and associated examples.” In section 2.1–Interpretation of Expected Number, this “Guideline for Interpretation of Ozone Air Quality Standards” says as long as “this arithmetic average remains ‘less than or equal to 1’ the area is in compliance. As far as rounding conventions are concerned, it suffices to carry one decimal place when computing the average.” In the 1990 amendments to the CAA, Congress expressly recognized the continuing validity of EPA guidance. *See generally, H Comm. Rep.* 101-490 pp. 197, 232 (1990) (House Energy and Commerce Committee Report). Under EPA regulations, a sum of 3.1 expected exceedances over a consecutive 3-year period complies with the standard because the average is 3.1 divided by 3 or 1.0333... that when rounded to carry one decimal place is 1.0 which does not exceed 1. The fractional value of the amount of expected exceedances arises due to missed monitoring days and derives from calculations pursuant to

⁹ The abbreviation “ppm” stands for parts per million.

¹⁰ “Guideline for the Interpretation of Ozone Air Quality Standards,” EPA-450/4-79-003, OAQPS No. 1.2-108, January 1979, docket item number EPA-R03-OAR-2011-0680-0003 in the docket for this action.

Appendix H to 40 CFR part 50. The form of the standard itself in terms of average number of “expected exceedances” is grounded in statistical considerations because the term “expected exceedances” is a statistical term. *See* section 2.0 of “Guideline for Interpretation of Ozone Air Quality Standards.” This fractional part of “expected exceedances” for a year or for a consecutive 3-year period arises from the calculation required using the procedures of Appendix H to 40 CFR part 50 to account for the number of days for which no valid data difference between the required number of required monitoring days in the year and the actual number of days with valid data with an allowance for the number of days a state may assume to be less than the standard level. These calculations were provided in Appendix A to “Technical Support Document – Determination of Failure to Attain by 2005 and Determination of Attainment by 2008 for the 1-Hour Ozone National Ambient Air Quality Standards in the Baltimore Nonattainment Area in Maryland.”¹¹ Thus, the form of the 1-hour ozone NAAQS restricts the level of uncertainty, in the form of missed monitoring data as expressed, in the case of the 2011 data for one monitor, as 3.1 expected exceedances over a three-year period.

This fractional number is not an indication that the area is not attaining the standard, but rather takes into consideration and accounts for missing data. Moreover, EPA determines whether the area is in attainment through the procedures and definitions supplied in the regulations and under long standing interpretations. EPA does not distinguish degrees of attainment. Once an area’s monitored concentrations show that it is below the level of concentrations defined as “attainment” of the standard, EPA considers the area to be in attainment of that standard.

Comment 3:

¹¹ Docket item number EPA-R03-OAR-2011-0680-0008 in the docket for this action.

The comments assert that EPA cannot determine that the Baltimore area is attaining the 1-hour ozone NAAQS for the period 2009 to 2011 unless and until EPA has determined the 2011 data meet the data quality standards of 40 CFR 50.9 and Appendix H for use in compliance determinations. The commenter stated that the data for 2011 reflect 209 out of 214 required monitoring days, with “three days assumed less than the standard,” and contends that EPA must show that the missing days are not contributing to nonattainment for 2009-2011, according to the applicable calculation methods.

Response 3:

EPA agrees that a determination of attainment of the revoked 1-hour ozone standard should be consistent with relevant regulatory requirements. EPA has determined that the 2011 data meet the quality assurance and certification requirements for use to determine compliance with the 1-hour ozone NAAQS through 2011. In making a determination of attainment, EPA relies on the most recent three years of complete, quality-assured data, and also reviews subsequent data that become available and that suggest consistency with continued attainment. On February 1, 2012 (77 FR 4940), EPA proposed a determination that the Baltimore area has attained the 1-hour ozone NAAQS, and included data showing that the area had attained the standard since 2008. Although at that point the 2011 data had not yet been certified by the State of Maryland, the data for prior years had been previously certified and showed continuous attainment, and available data for 2011 were consistent with continued attainment. On April 12, 2012, the Maryland Department of the Environment certified the 2011 air quality monitoring data for ozone as complete and quality-assured. EPA has reviewed the certified 2011 1-hour ozone monitoring data and determined that the certified 2011 data matches and is the same as that used to support

the February 1, 2012 NPR. Because data for 2011 have now have been certified as complete and quality-assured, this final rule determining that the Baltimore area is attaining the 1-hour ozone NAAQS is based upon the most recent three years of complete, quality-assured, certified air quality monitoring data for 2009 to 2011. As discussed in the previous response, the form of the 1-hour ozone NAAQS and Appendix H to 40 CFR part 50 (which contains the interpretation and procedures to calculate the number of expected exceedances for a year) account for any days for which valid data are missing. For this reason, EPA can determine the Baltimore area is attaining the 1-hour ozone NAAQS now that the 2011 data have been certified.

Comment 4:

The comments asserted that the 2008 1-hour ozone data for the Edgewood monitor is missing as evinced by an Ozone Monitor Report 2008 obtained from EPA's web page http://www.epa.gov/airdata/ad_rep_mon.html. Thus, the comments assert EPA needs to provide these data and verify that there actually were no values at the Edgewood monitor in 2008 above the 125 ppb level, and EPA needs to explain why the 2008 1-hour data for Edgewood, which is the critical monitoring data for determining attainment, is missing from its webpage. The comments expressed concern that the 8-hour averages are also very high which suggests that there may have been 1-hour levels above 125 ppb.

Response 4:

In response to this comment, EPA re-checked the 2008 1-hour ozone monitoring data for the Edgewood monitor (AQS ID number 24-025-1001). Although the 2008 data were complete and available through the portal EPA uses to access AQS, EPA learned that the data for 2008 had not

been completely available through the public portal access. The 2008 1-hour ozone air quality data were and are recorded in EPA's Air Quality Data (AQS) system, which is EPA's official repository for air quality data to be used for determinations of compliance with a NAAQS. In preparation for the February 1, 2012 NPR, on March 3, 2011, EPA viewed and retrieved the data in AQS for the 2008 (as well as the 2004 through 2007, and 2009 through 2010 years) ozone air quality data, and used this data in the compliance calculations for the proposed rule.¹² These calculations were provided in the Technical Support Document (TSD) – "Determination of Failure to Attain by 2005 and Determination of Attainment by 2008 for the 1-Hour Ozone National Ambient Air Quality Standards in the Baltimore Nonattainment Area in Maryland," dated January 26, 2012" for the proposed rule. *See* docket item EPA-R03-OAR-2011-0680-0008.¹³ After receiving the Sierra Club's comment on this issue, EPA re-checked and downloaded a "Monitor values Report" dated April 16, 2012, for the same 2008 data for the Edgewood monitoring site via the public access portal of "Air Data Mart."¹⁴ From an examination of this April 16, 2012 "Monitor Values Report," EPA learned that all the data for the ozone monitors in Harford County could not be accessed through that portal and that in fact the 2008 data were in AQS. The April 16, 2012 "Monitor Values Report" indicated that there were 4850 "observations" (data points) in AQS for the Edgewood monitoring site which equals the same number of observations as for the 202 valid days of monitoring data for the Edgewood monitor in 2008 used in the compliance calculations prepared for the February 1, 2012 NPR.^{15,16}

¹² There are several levels of access to AQS such as the public access portal "http://www.epa.gov/airdata/ad_rep_mon.html" and various restricted access portals used by States and EPA to enter or correct data and to print reports. EPA used a restricted access portal to obtain the 2008 data presented in the January 26, 2012, TSD.

¹³ Refer to the "Quicklook Criteria Parameters," Report Request ID 843146, Report Code AMP450, dated March 3, 2011, found in Attachment to Appendix A to the TSD dated January 26, 2011.

¹⁴ http://www.epa.gov/airdata/ad_rep_mon.html

¹⁵ The required ozone monitoring season in Maryland is 214 days (from April 1st to October 30th). *See* Table D-3 to Appendix D of 40 CFR Part 58.

Upon investigation EPA determined that there was a minor fault in the Air Data Mart public access portal system and has corrected the problem. EPA has verified that the complete 2008 data can now be accessed via the “Air Data Mart.” On May 1, 2012, EPA retrieved a copy from the “Air Data Mart” and placed a copy of the output which displays the 2008 data in the docket for this action.¹⁷ EPA has verified that the 2008 data for the Edgewood monitor now available through the “Air Data Mart” portal do not affect its determination of attainment for the area during any period that included 2008 data because the data available on May 1, 2012 via the “Air Data Mart” portal is the same as that EPA obtained on March 3, 2011 for use in the compliance calculations prepared for the February 1, 2012 NPR. These data values were thus considered by EPA and do not affect EPA’s determinations for any attainment period that included the 2008 data. Moreover, EPA has also determined here that the area is attaining the standard for the most recent three years of complete, quality-assured data, 2009-2011. EPA’s determination for this most recent period does not include or require reliance upon any data for 2008.

EPA recognizes that, for the 1997 ozone NAAQS, the 8-hour ozone values in the Baltimore area exceed that NAAQS, and EPA has taken action accordingly:

1. On February 1, 2012, EPA determined that the Baltimore 1997 8-hour moderate ozone nonattainment area had failed to attain the 1997 8-hour NAAQS by its applicable attainment

¹⁶ Refer to the “Monitor Values Report” from U.S. EPA Air Data <http://www.epa.gov/airdata>, generated April 16, 2012. A copy of this report has been placed in the docket for this action.

¹⁷ Refer to the “Monitor Values Report” from U.S. EPA Air Data <http://www.epa.gov/airdata>, generated May 1, 2012.

date, and the Baltimore area was reclassified as a serious ozone nonattainment area.¹⁸ *See* 77 FR 4901, February 1, 2012.

2. On April 30, 2012, the EPA Administrator signed a final rule that designated areas as nonattainment or attainment for 2008 ozone NAAQS, which is codified at 40 CFR 50.15. The Baltimore, MD area was included as a nonattainment area. *See* 77 FR 30088 at 30127, May 21, 2012.

B. Comments Concerning Effect of Determination of Baltimore area's Failure to Attain the 1-Hour Ozone NAAQS

Comment 1:

The comments express support for EPA's statement that the Baltimore area's failure to attain by its statutory 1-hour attainment date of November 15, 2005 bears on obligations with respect to two 1-hour ozone anti-backsliding requirements whose implementation would be triggered by a finding of failure to attain: contingency measures for failure to attain and section 185 major stationary source fee programs. However, the commenter disagrees with the proposed rule's discussion of the effect of the determination on these 1-hour ozone anti-backsliding requirements. Specifically, the commenter criticizes EPA's statements below:

1. "If this determination [of current 1-hour attainment of ozone NAAQS] is finalized, then even if EPA finalizes its proposed determination that the area failed to attain the 1-hour ozone

¹⁸ The boundaries of the "Baltimore" nonattainment areas are the same under both the 1-hour and 1997 8-hour (40 CFF 50.10) NAAQS.

standard by the 2005 deadline, it will not result in any 1-hour ozone contingency measure obligations for the area.” *See* 77 FR 4940 at 4943.

2. “A final determination of failure to attain by the area’s 1-hour attainment date would trigger the 1-hour anti-backsliding obligation to implement the penalty fee program under section[s] 182(d)(3)[,] 182(f) and 185, unless that obligation is terminated.” *See* 77 FR 4940 at 4943.

The comments assert that under the *South Coast* decision EPA is obligated to enforce contingency and fee measures in areas that fail to attain the 1-hour ozone NAAQS by their attainment dates and is not authorized to release the area from its contingency obligations or to terminate the obligation to pay the section 185 and other fees

With respect to the section 185 fee requirement, the commenter states that the Baltimore area failed to attain by November 15, 2005, and that the Baltimore area did not receive an extension of its attainment date (section 181 (a)(5) of the CAA). The commenter contends that therefore the area is subject to 185 fees on its major sources of VOCs and NO_x for the time period 2005 – 2008.

Response 1:

First, we wish to emphasize, as EPA stated in its proposal, that the purpose of this rulemaking notice is to make specific air quality determinations regarding whether the Baltimore area attained the revoked 1-hour ozone standard. While EPA's proposal stated that these determinations bear on 1-hour anti-backsliding requirements for contingency measures and CAA section 185 penalty fees, this notice does not attempt to address or resolve all the implementation issues regarding those requirements. Thus, Sierra Club's position that EPA's specific rulemakings on air quality determinations must also include resolutions of all anti-backsliding implementation issues that may flow from them is incorrect. While EPA recognizes that the anti-backsliding requirements for 1-hour ozone contingency measures and section 185 fees are linked to the determination of failure to meet the attainment deadline for that standard, EPA's rulemakings here regarding those determinations do not, and are not required to, dispose of all implementation issues for those requirements or for others, such as those raised in Sierra Club's comments regarding milestones and additional planning.

Nevertheless, EPA sets forth below its views on points raised by the commenter. First, with respect to contingency measures, EPA believes that, as EPA explains in its response below in the context of the requirement for section 185 penalty fees, it is EPA's final determination that the area failed to attain by its attainment date that triggers the requirement to implement these. Since EPA is also finalizing here its determination that the area is currently attaining the 1-hour ozone standard, the obligation to submit or implement any measures is suspended. This would be the case, moreover, even if the obligation for contingency measures had been triggered at an earlier date because the purpose of nonattainment contingency measures for failure to attain is to provide for progress towards attainment. Once attainment has been reached, this purpose is

satisfied. EPA's Clean Data Policy and the many Courts which have upheld it, including *National Resources Defense Council v. EPA*, 571 F.3d 1249 (D.C. Cir. 2009), support this rationale.¹⁹ Contrary to commenter's complaint, EPA is not here unlawfully refusing to effectuate the anti-backsliding requirement for contingency measures. Nor is EPA unlawfully releasing the area from its anti-backsliding obligation with respect to contingency measures. To the contrary, EPA is following the long-established legal path to determining that the contingency measure requirement has been satisfied by a determination, after notice-and-comment rulemaking, of attainment of the 1-hour ozone standard. In making the determination that the area failed to attain the 1-hour ozone standard by its applicable attainment date, and concurrently making the determination that the area has been attaining the 1-hour ozone standard since 2008, and that it continues to attain that standard, EPA is enforcing the anti-backsliding requirement. The Baltimore area is not backsliding on the 1-hour ozone standard; as EPA has determined, the Baltimore area has attained that standard, and continues to attain it.

EPA also points out that in these circumstances EPA is not required to show the causes or amounts of the reductions that have brought the area into attainment over the last years. EPA's discussion of the contributions that the 1997 ozone controls have made to 1-hour ozone attainment was aimed at showing that 1-hour attainment has occurred in the context of ongoing reductions for a more stringent ozone standard. This showing is not necessary to and is not relied upon in EPA's determination that the obligation to submit 1-hour ozone contingency measures has been satisfied.

¹⁹ See also *Sierra Club v. EPA*, 99 F. 3d 1551 (10th Cir.1996); *Sierra Club v. EPA*, 375 F.3d 537(7th Cir. 2004); and *Our Children's Earth Foundation v. EPA*, No. 04-73032 (9thCir. June 28, 2005) (memorandum opinion). See the additional cases listed in footnote 7 of the February 1, 2012 NPR (77 FR 4940 at 4943).

In its comments, Sierra Club argues that EPA's determination that the Baltimore area failed to attain by its 1-hour ozone attainment deadline also requires EPA to decide here that it must retroactively collect penalties under section 185 for the period before EPA made its determination.²⁰ We disagree. Neither EPA's determination, nor the *South Coast* case, compels EPA to reach this conclusion or even to decide that issue here. EPA intends to address issues regarding 1-hour anti-backsliding requirements in future rulemakings on implementation of the section 185 requirements for the Baltimore area. Nevertheless, we wish to express our preliminary views on Sierra Club's comments below. EPA's preliminary views, as set forth below, are not necessary to and are independent of its air quality determinations regarding nonattainment and attainment that are contained in this notice of final rulemaking.

Sierra Club's comments quote at length from *South Coast*, 472 F.3d at 902-903. While EPA acknowledges that this decision established that section 185 fee requirements were to be included as anti-backsliding measures, the Court in that case did not direct any specific means of enforcement of these requirements, nor the method for determining whether an area failed to attain by its attainment date. That decision established only that the section 185 and contingency measure requirements were "applicable." It did not establish or even address how those requirements were to be implemented.²¹

²⁰ As explained above and elsewhere in our response to comments, EPA disagrees with Sierra Club's contentions regarding retroactive collection of fees. As a technical point, however, we note that under section 185, the earliest year for which fees could ever have been required to be paid is the calendar year following the attainment date, November 15, 2005. Thus, it is clear that under no circumstances would fees be due for 2005.

²¹ Moreover, as EPA explained above, those issues are ancillary to the determination of failure to attain the 1-hour ozone standard that EPA is finalizing in this rulemaking.

The D.C. Circuit, however, has previously upheld EPA's longstanding practice of making determinations of an area's failure to meet attainment deadlines solely through notice and comment rulemaking. *See Sierra Club v. Whitman*, 285 F.3d 63 (D.C. Cir. 2002). In that case, which similarly arose from a determination of failure of a 1-hour ozone nonattainment area to meet its attainment deadline, the D.C. Circuit rejected a litigant's²² demand to make the consequences of that determination retroactive to the time period before EPA made the determination. *See Sierra Club v. Whitman*, 285 F.3d 63 (D.C. Cir. 2002).²³ In that case, Sierra Club similarly argued that EPA's overdue determination that the St. Louis 1-hour ozone nonattainment area failed to attain by its attainment deadline should apply retroactively, and that the Court should require retroactive reclassification of the area. The Court rejected Sierra Club's contention that an EPA rulemaking was not required to determine a failure to attain.

"No matter what the Sierra Club thinks the Clean Air Act or the APA required of EPA, the fact remains that 'EPA's established practice for making a final decision concerning nonattainment and reclassification is to conduct a rulemaking under the APA, not to issue a letter, a list, or some other informal document.' [citations omitted.]" The Court concluded: "In other words, if there has not been a rulemaking there has not been an attainment determination." 285 F.3d at 66.

²² In that case, also *Sierra Club*.

²³ *Sierra Club v. Whitman* was discussed and distinguished in a recent D.C. Circuit decision that addressed retroactivity in a quite different context, where, unlike here, EPA sought to give its regulations retroactive effect. *National Petrochemical and Refiners Ass'n v. EPA*, 630 F.3d 145, 163 (D.C. Cir. 2010), *rehearing denied* 643 F.3d 958 (D.C. Cir. 2011), *cert denied* 132 S. Ct. 571 (2011).

The Court also refused to accept Sierra Club's assertion that the Court should compel EPA to give retroactive effect to its determination, resulting in reclassification as of the area's attainment date. The Court stated: "Although EPA failed to make the nonattainment determination within the statutory time frame, Sierra Club's proposed solution only makes the situation worse. Retroactive relief would likely impose large costs on the states, which would face fines and suits for not implementing air pollution prevention plans [earlier], even though they were not on notice at the time." 285 F.3d at 68.

While it is true that the Clean Air Act provides that both reclassification and penalty fees are consequences of failure to attain the ozone standard, the D.C. Circuit in *Sierra Club* recognized that these weighty consequences are not triggered until EPA makes a determination, after notice and comment rulemaking, of failure to attain. In that case, the Court also rejected the view that adverse consequences from the determination should be imposed retroactively, especially if it would, as here, subject the states to additional burdens caused by retroactive requirements that they were not given notice of prior to conclusion of the rulemaking process.

Several features of our rulemaking for Baltimore provide additional grounds for application of a similar position to that taken by the court in the St. Louis *Sierra Club* case. In the case of St. Louis, when the question of retroactive application arose, the area remained in nonattainment of the 1-hour ozone standard, which was also still the only standard in effect at the time of the Court's decision. Here, unlike St. Louis, EPA has determined that the Baltimore area is currently attaining the 1-hour ozone standard, and thus there is significantly less reason to consider imposing retroactive penalties that are intended to bring about the attainment that has

already occurred.

Sierra Club here argues, unpersuasively, that the *South Coast* opinion supports retroactive imposition of penalties, quoting the Court's statement that, unless section 185 requirements were applicable, "a state could go unpenalized without ever attaining even the original NAAQS...." 472 F.3d at 903. Here, however, this possibility does not exist. EPA's final determination in this rulemaking establishes that the Baltimore area has in fact attained the 1-hour ozone standard.

Sierra Club quotes the Court's statement in *South Coast* that "Congress set the penalty deadline well into the future, giving states and industry ample notice and sufficient incentives to avoid the penalties." 372 F.3d at 903. Notice of the existence of penalty provisions, however, is not the same as notice that these provisions have been triggered. As the D.C. Circuit recognized in *Sierra Club v. Whitman*, only when EPA issues a final notice determining that an area has failed to attain by the attainment date can that failure be definitively established. The case of Baltimore presents a particularly compelling context in which to apply this principle. The Baltimore area has been attaining the 1-hour ozone standard since 2008. No incentives – and certainly no penalties – are required for the area to reach attainment²⁴, a goal that the area has met and preserved. Under these circumstances, and based on the D.C. Circuit's and EPA's long held position on the issue of retroactive consequences of determinations of failure to attain, EPA cannot see a reason to impose penalties on sources in Baltimore. As explained above, EPA is determining that the area is currently, and has for some time been, attaining the 1-hour ozone standard. Thus no anti-backsliding purpose is served by retroactive imposition of fees for a

²⁴ Sierra Club appears to recognize this, since it does not request EPA to impose penalties for the time period after the area attained the standard (2010 to the present).

failure to meet a deadline for a revoked standard, under circumstances that existed years ago, which have since been eclipsed by continuous attainment. EPA believes that forcing the states and sources to address old penalties now would also divert attention and resources from efforts to achieve current, forward-looking environmental goals, including the stricter 2008 ozone standard. In these circumstances, giving retroactive effect to EPA's determination of failure to attain the standard here would be unreasonable, and it would, as the Court held in *Sierra Club v. Whitman*, "only mak[e] the situation worse."

Comment 2:

The commenter asserts under *South Coast* (at 903-904) that, "anti-backsliding" considerations require that 1-hour contingency measures must remain in place even after transitioning away from the 1-hour ozone standard. The commenter asserts that because EPA has not yet approved contingency measures for failure to attain for the Baltimore area, EPA must take remedial action either under 42 U.S.C. § 7410(k)(5) to issue a call for a plan revision for the required contingency measures or under 42 U.S.C. § 7410(k)(6) to correct its final action on the SIP for the Baltimore area by disapproving the submission²⁵ for lack of the contingency measures. The comments assert that EPA must issue a Federal Implementation Plan (FIP) that includes the required contingency measures.

²⁵ The comments used the phrase "disapprove the submit."

Response 2:

Even if there existed any outstanding SIP submission requirement for contingency measures for failing to meet the deadline to attain the revoked 1-hour ozone standard, EPA's final determination here that the area has attained the 1-hour ozone standard suspends that requirement. Pursuant to EPA's Clean Data Policy, EPA's determination that the area has attained the 1-hour ozone standard means that attainment has been reached, and thus the purpose of the contingency measures is fulfilled.

Comment 3:

The commenters claim that any contingency measures now needed must be from "current emissions" and that crediting reductions from measures in the reasonable further progress (RFP) for 2008 under the 1997 ozone NAAQS is not supported by any statutory authority. In addition, the commenters claim that use of the RFP reductions in the RFP plan for 2008 is arbitrary for two reasons:

The commenters claim that the 2008 RFP plan does not provide enough reductions of VOC emissions and that EPA cannot rely on substituting NO_x reductions because there is no direct NO_x to VOC trade-off. The comments assert that the 1-hour contingency requirement is 13.77 tons per day (tpd) of VOC reductions whereas the RFP plan required 2.05 tpd of VOC reductions to leave a shortfall of 11.72 tpd of VOC reductions. The comments claim the contingency plan cannot rely on the "1997" ozone NAAQS²⁶ requiring more NO_x reductions than the 1-hour contingency requirement "because there is no such thing as a direct NO_x to VOCs trade off" and

²⁶ See 40 CFR 50.10.

that ozone formation is more complicated than that. The comments further contend because EPA has not demonstrated that the RFP reductions have been achieved EPA cannot credit them towards the contingency requirement.

Response 3:

EPA disagrees with this comment. EPA believes that EPA's determination that the Baltimore area attained the 1-hour ozone NAAQS in 2008 and has continued to attain this NAAQS suspends the requirement for submission of 1-hour ozone contingency measures. EPA's final determination of attainment for the 1-hour ozone standard removes the need at this time to further address any comments or objections related to the contingency measure requirement. EPA's determination that the area has been attaining the 1-hour ozone standard since 2008, and continues to attain the standard, provides independent and sufficient grounds for concluding that the 1-hour contingency measure anti-backsliding requirement is satisfied. No additional reductions from contingency measures – or any other measures -- are needed to bring about attainment of the 1-hour ozone standard or reasonable progress toward that attainment, which has already been achieved.

Thus it is not necessary for the purpose of finalizing this notice to address the commenter's critique of EPA's discussion, in its proposed rulemaking, of emissions reductions that may have contributed to attainment. In the February 1, 2012 NPR, EPA included a discussion of emissions reductions that had occurred in Baltimore in the period after the area's 1-hour ozone attainment deadline. EPA's discussion described certain emissions reductions that served the same function as contingency measures would have done, whether or not the measures that brought about those

reductions had formally been approved as contingency measures. The commenter addresses EPA's discussion and criticizes its analysis of post-2005 reductions. While EPA disagrees with the commenter's views of these reductions, and believes that they reflect a misunderstanding of the CAA requirements, EPA finds it unnecessary to respond specifically to them in this rulemaking. The purpose of contingency measures is to bring about attainment, and EPA's determination that the area has attained the 1-hour ozone standard shows that this purpose has been achieved. In these circumstances, it is not necessary to reach agreement on calculations regarding the emissions reductions that brought the area into attainment. Attainment of the 1-hour ozone standard has been reached, and thus no contingency measures are required to reach attainment. This is all the more true for an area subject to ongoing implementation of additional control measures for the 1997 8-hour ozone standard. The decision of the D.C. Circuit in *South Coast* did not address or invalidate the Clean Data Policy, which was upheld by that Circuit in *Natural Resources Defense Council v. EPA*.

Comment 4:

The commenter claims that the contingency measures should have come into place in 2005 when the area was violating, and, therefore, EPA cannot use the Clean Data Policy to suspend the requirement because, the commenter argues: (1) The FIP clock should have long since passed and a clean data determination cannot excuse EPA from its FIP obligation; (2) to use the Clean Data Policy would effectively remove the contingency measure requirement and create a backslide by removing a requirement that should have been in place before the clean data

determination. The commenter claims that the Court in *South Coast* precludes EPA from removing requirements that were required before this clean data determination.²⁷

Response 4:

As set forth in EPA's response to comments above, prior to this final rulemaking EPA had not determined that the area failed to attain by its attainment deadline, and thus, contrary to the commenter's contention, no contingency measures for failure to attain had been triggered. *See Sierra Club v. Whitman*, cited above in EPA's Response to Comment. Moreover, as explained elsewhere in this notice and in EPA's proposed rulemaking, EPA is also making here a final determination that the area has attained the 1-hour ozone standard. This determination establishes that the purpose of the contingency measures has been fulfilled. This is the case even if it is determined that the area previously failed to attain by the applicable deadline. A determination that the area has attained and continues to attain the standard, whenever it is issued, logically means that no contingency measures need be adopted to reach attainment. Thus there is no legal or common sense justification for a retroactive imposition of ozone contingency measures intended to achieve attainment of the revoked 1-hour ozone standard, a goal that has already been reached.

EPA's prior rulemakings demonstrate that its interpretation under the Clean Data Policy applies after revocation of the 1-hour ozone standard, and after the *South Coast* decision (*See* 74 FR 13166 (March 26, 2009) and 75 FR 6570 (February 10, 2010)). Moreover, since there was and is

²⁷ The comments contend that the Baltimore area is still experiencing "exceedances" of the 1-hour ozone NAAQS. An exceedance of the standard does not constitute a violation of that standard. EPA responses elsewhere in this document show that the 1-hour ozone NAAQS defines an area as attaining the standard if it has fewer than or equal to 3.1 expected exceedances over any consecutive 3-year period. As EPA has shown, for the past four years, since 2008, the Baltimore area has not monitored a violation of the 1-hour ozone NAAQS.

no state obligation to adopt one- hour contingency measures, there is no FIP obligation. Because no SIP deficiency exists with respect to 1-hour ozone contingency measures, no FIP requirement based upon it exists either. Contrary to commenter’s claim, EPA’s interpretation under the Clean Data Policy does not act to remove an anti-backsliding requirement; rather, as the Courts have held, even when the 1-hour ozone standard was in effect, it is an interpretation that the requirement is satisfied by attainment. *Sierra Club v. EPA* (10th Cir. 1996). Contingency measures have no meaning while an area is attainment.

C. Comments concerning Revised State Implementation Plan for 1-hour Ozone

Comment 1:

The commenter asserts that section 182 of the CAA requires EPA to require Maryland to submit a “revised SIP” for ozone for the Baltimore area. To support this proposition, the commenter cites the opening paragraph of section 182(d).²⁸ The commenter states that the plans required by sections 182(c) and (d) of the CAA include but are not limited to “enhanced monitoring, attainment and reasonable further progress²⁹ demonstrations, NOx control, and contingency provisions, as well as the enforcement of fees under “section 182(d)(3)” (that is the section 185 fees).

Response 1:

EPA disagrees that Maryland must submit additional SIP revisions for attainment and reasonable further progress demonstrations, NOx control, and contingency provisions as a consequence of

²⁸ This paragraph states: “Each State in which all or part of a Severe Area is located shall, with respect to the Severe Area, make the submissions described under subsection (c) [i.e., section 182(c)] of this section (relating to Serious Areas), and shall also submit the revisions to the applicable implementation plan (including the plan items) described under this subsection [section 182(d)].” (with clarifying citations added)

²⁹ “RFP” hereafter.

EPA's determination that the Baltimore area failed to attain the revoked 1-hour ozone standard by November 15, 2005. EPA does not agree with commenter's view regarding requirements for a severe nonattainment area that fails to meet its attainment deadline to revise its SIP to provide for additional RFP demonstrations and contingency measures under CAA section 182. Nor does EPA believe that section 181(b)(4) of the CAA imposes any requirements for the revoked 1-hour ozone standard, because no further 1-hour ozone planning requirements under that provision or any other, applicable to an area such as Baltimore, were preserved in anti-backsliding.

After a standard has been revoked, there is no requirement to revise an initial attainment demonstration for a severe area after the area fails to attain by the statutorily applicable attainment date.³⁰ We disagree with the commenter's claim that EPA's determination here triggers the Baltimore area's obligations to adopt and submit a broad variety of additional SIP revisions for the revoked 1-hour ozone standard. A plan revision under section 181(b)(4) of the CAA is not an applicable anti-backsliding requirement under EPA's anti-backsliding regulations. As EPA has explained in other rulemakings, only those anti-backsliding requirements that were specifically retained by the anti-backsliding rule, 40 CFR 51.905, and by the decision in *South Coast* are applicable, and others cited by the commenter are not included. *See* 76 FR 82133 at 82139-140 (December 30, 2011). As EPA stated in its proposal, the only anti-backsliding measures that pertain to this determination of failure to meet the 1-hour deadline are 1-hour contingency measures for failure to attain and section 185 penalty fees.

Moreover, as set forth above, under EPA's Clean Data Policy, EPA's determination that the area

³⁰ As noted in the February 1, 2012 NPR, EPA has fully approved into the Maryland SIP a 1-hour ozone attainment demonstration, reasonably available control measures and reasonable further progress (RFP) plans, and RFP contingency measures for the Baltimore area. *See* 77 FR 4940 at 4942-4943, February 1, 2012.

is currently attaining the 1-hour ozone standard obviates the need for submission of any planning requirements related to attainment of the standard. Section 181(b)(4) of the CAA, cited by the commenter, was not preserved as an anti-backsliding requirement for the 1-hour ozone standard. In the February 1, 2012 NPR, EPA stated that its determination “relates [solely] to effectuating the anti-backsliding requirements that are specifically retained.” *See* 77 FR 4940 at 4942, February 1, 2012.

Comment 2:

The comments state that if EPA maintains that the Baltimore area has attained the 1-hour ozone standard, EPA must require a new SIP under “42 U.S.C. §7505s(a)”³¹ which would provide for “the maintenance of the national primary ambient air quality standard for such area in the area concerned for at least 10 years after the redesignation.”

Response 2:

EPA disagrees with the comment for several reasons. Section 175A of the CAA requires that a state submit a “maintenance plan”³² for the area for which redesignation to attainment is sought. Section 175A of the CAA applies in conjunction with a state’s request to redesignate an area from nonattainment to attainment pursuant to section 107(d)(3) of the CAA. The maintenance plan referred to takes effect after EPA approves the area’s redesignation to attainment. Until a state submits such a request for redesignation of a nonattainment area, section 175A by its own terms does not require submission of any SIP revision.

³¹ Based upon context ,EPA concludes the citation to §7505s(a) in the comment letter is a scrivener’s error and should be to 42 U.S.C. section 7505a(a) (section 175A(a)).

³² A maintenance plan is a SIP revision to provide for maintenance of the NAAQS in question for a period of ten years after the area is redesignated to attainment. *See*, 42 U.S.C. 7505a(a).

Section 175A(a) of the CAA provides that each state which submits a request for redesignation of an area to attainment “shall also submit” a maintenance plan under section 175A of the CAA. In context “shall also submit” means that the state must submit a maintenance plan under section 175A only when it requests redesignation under section 107(d)(3)(E) of the CAA. Thus section 175A compels submission of a maintenance plan if and only if the state submits a request for redesignation of a nonattainment area to attainment. Sections 107(d)(3)(E) and 175A of the CAA do not require submission of a request to redesignate an area to attainment, nor do they require submission of a maintenance plan in the absence of a redesignation request. As set forth in EPA’s responses above, EPA no longer redesignates areas for the revoked 1-hour ozone standard.

EPA no longer redesignates areas to attainment of the 1-hour ozone NAAQS because EPA revoked that NAAQS on June 15, 2005, as a result of implementation of the more protective 1997 ozone NAAQS. EPA notes that the Baltimore area is designated as serious nonattainment for the 1997 ozone NAAQS and has been designated classified as moderate nonattainment for the 2008 ozone NAAQS.³³ For all the reasons set forth above, no requirement for a 1-hour ozone maintenance plan under section 175A of the CAA is applicable to the Baltimore area.

IV. Final Actions

EPA is making two separate and independent determinations related to the Baltimore 1-hour

³³ Subsequent to June 15, 2005, EPA has issued a revised ozone NAAQS (the 2008 ozone NAAQS codified at 40 CFR 50.15) for which the level of the standard, 0.075 ppm – lower than the 0.08 ppm of the 1997 ozone NAAQS. A May 21, 2012 (77 FR 30088 at 30127) final rule designated and classified the Baltimore area as moderate nonattainment under the 2008 ozone NAAQS.

ozone nonattainment area. These determinations are based upon complete, quality-assured and certified ozone monitoring data.

A. Determination of Failure to Attain the 1-hour Ozone NAAQS by the Applicable Attainment Date

With respect to the 1-hour ozone standard, and pursuant to EPA's authority to ensure implementation of 1-hour ozone anti-backsliding requirements and under CAA section 301, EPA is determining that data for 2003-2005 show that the Baltimore area previously failed to attain the 1-hour ozone standard by its applicable November 15, 2005 attainment deadline.

B. Determination of Current Attainment of the 1-hour Ozone NAAQS

EPA is determining that the Baltimore area is currently attaining the 1-hour ozone standard. EPA's determination is based on the most recent three years of complete, quality-assured and certified data for 2009-2011. In addition complete, quality assured and certified data show that the Baltimore area has attained since the 2006-2008 monitoring period and for every three-year period since that time. Pursuant to EPA's interpretation, as set forth in its Clean Data Policy and the cases and regulations that embody it, EPA has determined that the Baltimore area is no longer obligated to submit and implement the 1-hour ozone contingency measure requirement of CAA section 172(c)(9).

V. Statutory and Executive Order Reviews

A. General Requirements

This action makes determinations of attainment and nonattainment based on monitored air

quality data and does not impose additional requirements beyond those imposed by statute or regulation. For that reason, this action:

- Is not “significant regulatory actions” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

- In addition, these final actions regarding attainment of the 1-hour ozone NAAQS in the Baltimore area do not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [Insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action regarding determinations concerning attainment of the 1-hour ozone NAAQS in the Baltimore area may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: May 30, 2012

W. C. Early
Acting Regional Administrator,
Region III.

40 CFR part 52 is amended as follows:

PART 52 - [AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart V--Maryland

2. Section 52.1076 is amended by adding paragraph (y) to read as follows.

§52.1076 Control strategy plans for attainment and rate-of-progress: Ozone.

* * * * *

(y) Determination—EPA has determined that, as of [Insert date 30 days from date of publication], the Baltimore 1-hour ozone nonattainment area has attained the 1-hour ozone standard and that this determination obviates the requirement for Maryland to submit for the Baltimore area the 1-hour ozone contingency measure requirements of section 172(c)(9) of the Clean Air Act.

3. Section 52.1082 is amended by adding paragraphs (f) and (g) to read as follows.

§ 52.1082 Determinations of attainment.

* * * * *

(f) Based upon EPA's review of the air quality data for the 3-year period 2003 to 2005, EPA determined, as of [Insert date 30 days from date of publication], that the Baltimore 1-hour ozone nonattainment area did not attain the 1-hour ozone standard as of its applicable 1-hour ozone attainment date of November 15, 2005.

(g) Based on 2009-2011 complete, quality-assured ozone monitoring data at all monitoring sites in the Baltimore 1-hour ozone nonattainment area, EPA determined, as of [Insert date 30 days from date of publication], that the Baltimore 1-hour ozone nonattainment area has attained the 1-hour ozone standard.

[FR Doc. 2012-14141 Filed 06/11/2012 at 8:45 am; Publication Date: 06/12/2012]